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BEFORE
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CABLE SERVICES BUREAU
FORUM ON AT&T/MEDIAONE MERGER APPLICATION

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Introduction

I would like to thank the Commission and the Cable Services Bureau for the opportunity to speak here today on behalf of Seren Innovations, Inc., a new entrant offering an array of telecommunications services, including cable television. I will focus my remarks on how AT&T already has used its cable monopoly power to hinder competition from Seren and our concern that AT&T's acquisition of MediaOne will further enhance its power over the video programming marketplace, unless the Commission imposes appropriate safeguards.

Seren's Background

Let me begin by briefly describing Seren Innovations. Seren was formed in 1996 as a non-regulated subsidiary of Northern States Power Company to provide high-speed Internet, cable television and telephone service to residential and business customers, through a state-of-the-art hybrid fiber optic and coaxial cable broadband network. Seren has received several cable television franchises in Minnesota and is already providing its full complement of services in St. Cloud and Waite Parke, Minnesota, including more than two hundred cable channels. In addition, Seren is about to begin commercial service in Concord, California, has four other franchise applications pending in California, and has filed a cable franchise application in Longmont, Colorado, with plans for other Colorado locations.

In sum, Seren is fulfilling the intent of the Telecommunications Act by competing head-to-head with entrenched incumbents in both the cable and telephone industries. On the video side, access to popular cable programming networks is vital to Seren's ability to compete. Unfortunately, the multichannel video programming distribution marketplace continues to be dominated by cable monopolies which use their market power to deprive rivals of programming. The unquestioned leader in this regard is AT&T, just as was its predecessor, TCI.

Problems Gaining Access to Programming

You have already heard earlier today about the high level of horizontal concentration in the cable industry and, in particular, the extremely high market share of AT&T. While there may be quibbles about exactly what AT&T's ownership percentage is, there can be no doubt that AT&T enjoys enormous power in cable markets and that this power will increase as a result of the MediaOne acquisition. The best evidence of AT&T's monopoly power is the fact that every time an overbuilder like Seren enters the market, AT&T responds by dropping its prices or adding new services at no charge.

This market power problem is exacerbated by the concurrent formation of ever larger regional clusters by AT&T and other large MSOs. As the Commission warned in its 1998 Competition Report, this increased concentration makes it more likely that large cable operators, who do not compete with each other in local downstream markets, will be able to collude in the upstream market for the distribution of programming.[1] This Commission finding is consistent with the

[1] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24284, 24362 (1998) ("*1 998 Competition Report").*

recent GAO report finding program suppliers very dependent on large cable companies.*

One of the ways cable MSOs can collude is to pressure programmers not to sell to rivals. Complaints about such behavior were a major element in the passage of the 1992 Cable Act with its program access provisions. However, the problem Congress addressed then has not gone away and is, in fact, made worse, by the increased concentration resulting from acquisitions like that of MediaOne by AT&T. What I would like to do this afternoon is to demonstrate the persistence of this problem and the need for the Commission to make sure the proposed merger does not worsen it, by describing two concrete examples where AT&T/TCI has abused its power over programmers.

The first instance involves Seren's attempt to gain access to Midwest SportsChannel, or MSC, a 24-hour regional sports network. Among the programs offered by MSC are Minnesota Twins baseball games, Minnesota Timberwolves basketball games, and University of Minnesota football, basketball and hockey games. I need hardly say that with this roster of sports, MSC programming is highly desirable in Minnesota. Many viewers will not subscribe to a service which does not offer MSC. Seren's experience is consistent with this Commission's finding that "sports programming . . . increasingly warrants, special mention because of its widespread appeal and strategic significance for MVPDs."[3]

Because MSC is wholly-owned by CBS, it is non-vertically-integrated under the Commission's program access rules. When Seren contacted MSC in 1998 to contract for its programming, we were told by MSC that it could not make its

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2 General Accounting Office, *Report to the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate, Telecommunications, The Changing Status of Competition to Cable Television 22* (July 1999).

3 1998 Competition Report at 24380.

programming available to Seren because of an exclusive contract it had with TCI, the incumbent cable operator in St. Cloud.

When Seren raised this issue in the AT&T/TCI merger proceeding, AT&T and TCI claimed that it had:

> "been entirely reasonable with its competitors in voluntarily relinquishing exclusivity in certain cases, even though it was under no obligation to do so under the program access rules"

and that it would

> "act reasonably and responsibly in this area."[4]

However, after the merger was approved, when Seren contacted TCI to ask it to make good on its representation to the Commission, Seren was told that neither TCI nor Bresnan, TCI's affiliate, was willing to waive its exclusivity, and Seren was denied access to MSC. To this day, Seren has been unable to obtain carriage of MSC.

My second example involves a cable network that is vertically-integrated, but where AT&T has taken advantage of another loophole in the program access regime: terrestrial delivery.

In October 1999, as Seren began its planned expansion to California, our programming personnel sought to obtain carriage of BayTV, a cable channel in the San Francisco Bay Area, offering a mix of sports, news, and other locally-oriented programming. BayTV is owned jointly by the Chronicle Broadcasting Company and AT&T and is delivered by terrestrial means. In December, Seren was told that

[4] *AT&T Corp./TCI*, *CS* Docket No. 98-78, Comments and Joint Opposition to Petition to Deny or to Impose Conditions, at 66 n.143 (Nov. 13, 1998).

it would not be allowed to carry Bay TV because AT&T had an exclusive contract for Bay TV and would not allow competitors such as Seren to carry it, although AT&T would make Bay TV available to other cable systems that did not compete with AT&T.

These are not the only instances where Seren has been denied programming because of exclusionary behavior on the part of the cable industry. Seren has also been denied access to several other non-vertically-integrated channels. However, these examples are representative of how the largest cable entity uses its power unfairly to hobble competitors and illustrate the danger of allowing it to further increase its power through this acquisition.

Recommended Conditions On Merger Approval

In any merger requiring Commission approval, the burden of proof is on the merging parties to demonstrate that the merger would be in the public interest. Part of the public interest standard is an assessment of the effect of a transfer on competition. Because the proposed merger will further increase AT&T's already substantial power over programmers, it would be entirely appropriate for the Commission to deal with this competitive problem by conditioning its approval of the merger on AT&T's agreement not to abuse its power in the programming market.

This can be accomplished by a simple and quite limited provision: AT&T should be required to agree that the program access rules will be applicable to all of its programming contracts, whether or not with vertically-integrated companies, and regardless of whether delivery is via satellite or terrestrial means. Such relief would be directly responsive to the anti-competitive impact of the acquisition and would therefore be fully justified.

This relief would also make economic sense because it would focus on where the economic power over programmers is - at the MSO level - rather than making an artificial distinction between vertically and non-vertically integrated programming. It would also prevent AT&T from using a technological loophole, the medium used for program delivery, to avoid the program access rules.

Because programming exclusivity on occasion may not be contrary to the public interest, AT&T could be permitted exclusivity where it demonstrates to the Commission's satisfaction that an exclusive contract meets the public interest criteria and procedures detailed in the program access rules.

This very limited condition would deal effectively with the source of the problem – AT&T's market power – with a minimum of regulatory intervention. It is thus a clear, clean response to a very real competitive problem, which will be worsened by the merger of these two very large MSOs.

Thank you for your time today. I will be happy to answer any questions you may have.